Central Law Journal.

ST. LOUIS, MO., NOVEMBER 26, 1897.

The proposition that mental suffering alone, not accompanied by any physical injury, cannot be the foundation for the recovery of damages, except in some instances where they are allowed as a species of punitive damages, though for a long time the subject of contention, may now be considered as settled, all modern decisions being to that effect. The latest case is Kalen v. Terre Haute & I. R. Co., wherein the Supreme Court of Indiana recently held that there can be no recovery under a complaint which alleges, by way of showing damages arising from defendant's wrongful act in causing the horse attached to a buggy in which plaintiff was riding with her husband to take fright and run away, that plaintiff received a severe nervous shock, was greatly frightened, and her life was put in great and imminent peril, and that she has suffered great mental pain and anxiety. The court cites the leading cases on the subject, including Canning v. Inhabitants of Williamstown, 1 Cush. 451; City of Salina v. Trosper, 27 Kan. 544; Railroad Co. v. McGinnis, 46 Kan. 109, 26 Pac. Rep. 453; Morse v. Duncan, 14 Fed. Rep. 396; Wyman v. Leavitt, 71 Me. 227; Johnson v. Wells, Fargo & Co., 6 Nev. 224; Railroad Co. v. Stables, 62 Ill. 313; Railroad Co. v. Brunker, 128 Ind. 542, 26 N. E. Rep. 178; Ewing v. Railway Co., 147 Pa. St. 40, 23 Atl. Rep. 340; Hale's Curator v. R. R. Co., 60 Fed. Rep. 557; Purcell v. R. R. Co., 48 Minn. 134. The Indiana court fails to notice the very late case of Mitchell v. Rochester Ry. Co., 45 N. E. Rep. 354, 44 Cent. L. J. 89, wherein the Court of Appeals of New York held that damages are not even recoverable for physical injuries resulting from mental shock.

Hollenbeck v. Hall, recently decided by the Supreme Court of Iowa, involves a curious and yet probably sound application of the law of libel. The action was for the publication of a letter stating in substance that plaintiff had for several years owed for medical services; that his attention had been repeatedly called thereto to no purpose; that, finally being sued therefor, he having no other defense, had cowardly slunk behind that of the statute of limitations, and that such a course was not in accordance with the writer's idea of strict integrity. The question was, is such a publication libelous within the meaning of the law? The court held in the negative upon the ground that it is not dishonorable to be indebted to another, nor is it libelous to publish of another that he owes money. To be in debt, remarks the court, is very common, and to be unable to make payment does not necessarily involve moral turpitude. Nor is the debtor's reputation brought in question by making a defense which the law sanctions, and which rests on sound reason and long experience. Formerly, pleading the statute of limitations was looked upon with disfavor. Lord Mansfield remarked in Quantock v. England, 5 Burrows, 2630, "that in honesty, a defendant ought not to defend himself by such a plea." The statute is now generally conceded to be beneficial, and the defense as legitimate as any other. As said by Justice Story in Spring v. Gray, 5 Mason, 523: "The defense, therefore, which it puts forth, is an honorable defense, which does not seek to avoid the payment of just claims or demands, admitted now to be due, but which encounters, in the only practical manner, such as are ancient and unacknowledged, and whatever may have been their original validity, such as are now beyond the power of the party to meet, with all the proper vouchers to repel them. The natural presumption certainly is that claims that have been long neglected are unfounded, or at least, are no longer subsisting demands. And this presumption the statute has erected into a positive bar. There is wisdom and policy in it, as it quickens the diligence of creditors, and guards innocent persons from being betrayed by their ignorance, or their overconfidence in regard to transactions which have become dimmed by age." It cannot be libelous to accuse one of doing what the law approves. In Homer v. Engelhardt, 117 Mass. 539, it is held that to accuse one of availing himself of the prohibitory liquor law, in order to defeat an indebtedness for liquor sold, is not libelous, the court remarking that, "the plaintiff having the right to make this defense, it is not libelous to publish the statement that he had done so." Bennett v. Williamson, 4 Sandf. 60, is precisely in point.

NOTES OF RECENT DECISIONS.

CIVIL RIGHTS — MASTER AND SERVANT— RESTAURANT KEEPER.—In Bryan v. Adler, 72 N. W. Rep. 368, decided by the Supreme Court of Wisconsin, it was held that, under the Civil Rights Act of that State, providing that any person, who shall deny the full and equal enjoyment of the accommodations, advantages, facilities, and privileges, of restaurants and other places of public accommodation or amusement to any person, shall be liable in damages to the person aggrieved thereby, the proprietors of a restaurant were so liable for the refusal of a waiter to serve a guest solely because he was a colored person, although the waiter acted in violation of their express command, and they did not at the time sanction, or know of, or subsequently ratify the waiter's act. This case is interesting upon the doctrine of master and servant, rather than upon the question of the valid scope of Civil Rights Acts. The question of the validity of such a statute as applied to restaurants, under the provisions of a State constitution, apparently was not raised.

VICIOUS ANIMAL — NEGLIGENCE — KNOWLEDGE OF OWNER.—In Clowdis v. Fresno Flume & Irrigation Co., 50 Pac. Rep. 373, decided by the Supreme Court of California, it was held that knowledge of servants put in charge of a bull to drive him to a certain place, that he is vicious, is knowledge of the owner, so as to make him liable to a stranger injured by him. It was further held that servants put in charge of a bull to drive him to a certain place, who on the way learn that he is vicious, render the owner liable to one thereafter injured by him on the trip, by continuing to drive him without taking precautions against accidents. The court said in part:

> It is quite true that knowledge by or notice to a servant charged with no duty in the matter, of the vicious propensities of an animal owned by the master is not notice to the master. The rule, however, is that a servant's knowledge, to whom an animal is intrusted of its ferocious disposition, is knowledge of the master sufficient to render the latter liable. Brice v. Bauer, 108 N. Y. 428, 15 N. E. Rep. 695; Cooley, Torts, p. 406, and note. In the present case Lovelace and Treece had been put in complete charge of the bull. It is a fundamental and most important principle of the law governing the responsibility of masters that whatever duty they owe to the public (or to their employees) must be performed, and a failure to perform, or improper performance, cannot be excused by a showing that execution was delegated to a servant, even of approved carefulness, knowledge or skill. It must further be shown that the servant, in the particular matter, exercised the full degree of care and showed the requisite amount of skill. And this is true, however subordinate or menial may be the rank of the servant. Whatever be his position, in that special employment he represents the master, and within its scope his knowledge is the master's knowledge, his acts the master's acts. Higgins v. Williams, 114 Cal. 176, 45 Pac. Rep. 1041; Donnelly v. Bridge Co. (S. F. No. 623), 49 Pac. Rep. 559. Every one, whether acting individually or through agents, is bound to exercise ordinary care to prevent injury to the person or property of another. Civ. Code, secs. 1708, 1714, 2330, 2338. Therefore when, as here, Lovelace and Treece had been sent upon an independent mission, and put in complete charge of the animal, they stood in the performance of their task in the place of the defendant, and the question of defendant's responsibility will be answered as may be answered the inquiry. What would have been the master's responsibility and liability had he personally been in charge of the animal? To this there can be but one answer: He would have been liable. Twice before on that very day had the bull evinced its ugly disposition by attacks actual and threatened. Here was ample proof of the fact of viciousness, and of the knowledge of that fact brought home to the master.
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> There is yet another and independent view of the matter which may be taken, and in this is eliminated all question of the master's knowledge. That view turns upon the master's liability for the negligent performance by a servant of a duty within the scope of his employment. The driving of the bull upon the highway was not within the employment of Lovelace and Treece, but it was their express task. In the performance of his duty, if injury was occasioned to one without fault by reason of their negligence, the master was liable. At the out set of the drive, when the men may be assumed to have believed that the beast was gentle, if it had suddenly and unexpectedly attacked and injured some person, it might well be argued that they were performing their task with due care, and that for the unexpected onslaught the master was not liable. But when thereafter, while engaged in this undertaking, they acquired knowledge of the animal's evil propensities, it became a question of fact for the jury whether or not they exercised the requisite degree of care in their subsequent management of it. The circumstance that the additional knowledge was acquired by them after the employment was undertaken, and was not known either to them or to their employer at the time it commenced, would not exonerate the latter. If the conductor of a passenger train should at any time during the journey discover a defective wheel, and, continuing the trip, injury should thereby result, the company would not be exonerated because the knowledge was acquired after the train had started. Yet there is no difference in principle between the cases, and what difference exists is merely in the degree of care exacted by law. Precisely such a cause of action as the one which we have been considering was not of Ficken v. Jones, 28 Cal. 618; and another in which the question is considered with much elaboration is that of Barnum v. Terpening, 75 Mich. 557, 42 N. W. Rep. 967.

THE INCONTESTABLE CLAUSE IN A LIFE INSURANCE POLICY.

The insurance policy issued by the insurance company to the insured is in the nature of a contract; the application for insurance by the person desiring to take out a policy, and the acceptance of it by the company evidenced by the policy, constitute, when taken together, the contract. The parties to the contract of insurance, the company and the insured, or his or her beneficiaries, are bound by all the conditions recited in the application for insurance and in the policy itself, in the same manner and for the same reason as upon an ordinary contract. Policies of insurance usually contain numerous conditions or clauses relating to various matters in regard to the insured, as suicide, fraud, health of the insured, habits, etc., and these are considered perfectly just and proper, since the insurance company is not supposed to take any risks without requiring the person taking out a policy to conform to these conditions. Many of these conditions are more or less essential to the validity of the policy in order to make it effectual. As the business of insurance increases it becomes necessary to simplify the policy so that suits upon it will not be unnecessarily maintained, and to settle the question in dispute more quickly and satisfactorily. There is a certain class of conditions or, as they will be called clauses, which will be treated especially; they are of comparatively recent origin, and, therefore, the decisions are not as yet very numerous. Such clauses are known as "incontestable or indisputable clauses." The word itself explains the meaning of such a policy and it is this, that the insurance company is estopped from contesting the policy, or setting up a defense, except such as it reserves to itself, or such as are allowed on the ground of public policy. This incontestable clause amounts to an agreement entered into between the company and the insured that such shall be the effect of the policy. There are two main classes of incontestable clauses: I. Those incontestable (*a*) absolutely or (*b*) as to certain matters. II. Those incontestable (*a*) after delivery (*b*) after a certain time. I. (*a*) Some policies issued by insurance companies are so-called "absolutely incontestable," that is, the company claims to preclude itself from setting up any defense whatever in an action on the policy by the insured, no matter what the breach of condition is. On the face of the policy this seems a just and reasonable condition, since it might be urged that it is within the company's knowledge and that the company must be perfectly well aware of the consequences of its own acts and should, therefore, be held liable for any such clause. But on examining the authorities on this point, it will be seen that the rule has been often declared that such a policy is void; that the underlying principle is, that such a policy is void on the ground of public policy, since fraud, which vitiates every contract, would be waived by any such policy. Such seems the reasonable rule and the true principle. It will be a matter of merely taking the chances of no suit being brought by the insured, and thus the company would be relieved from all right to suit in the matter. In Wright v. Mutual Benefit Association[1] there was this provision, that the validity of the policy should not be questioned after the death of the insured, and not after two years from the date of the issue. Potter, J., said: "This stipulation is not to waive all defenses and not to condone fraud, on the contrary it recognizes fraud and all the other defenses." This rule as stated in Bliss on Insurance, Sec. 247, is as follows: "An agreement that the insured will not raise any question or objection even in the direct case of personal fraud, is a void condition. It has been questioned whether such a condition would render the policy void *ab initio* as an illegal contract. In these cases fraud, if not mentioned, must be assumed to be excluded, since that construction will always be preferred which will support a contract. Of course, this construction cannot make the policy altogether "incontestable," for it leaves open the question, whether statement or omission of the insured was fraudulent or not, and also what is the true meaning of the policy itself. In one company claiming for its policy the title of "indisputable" the principle of indisputability was attempted to be carried out by the following proviso: "That every policy issued by the company shall be indefeasible and indisputable, and the fact of issuing the same shall be conclusive evidence of the validity of the policy, and the company shall not delay payment to the assured thereby on the ground

[1] 118 N. Y. 237 (1890).

of any error, mistake or omission, however important. (*b*) Policies on the other hand which are valid are such as are incontestable except as to certain matters as fraud, misrepresentations, non-payment of premiums, etc.[2]

II. *As to the Time When the Incontestable Clause takes Effect.*—Some of the policies are to the effect that, upon the delivery of the policy by the company and acceptance by the insured, it shall be incontestable. In speaking of such policies it must be noted that absolutely incontestable policies are not considered, since, as already stated, they are void. It would seem that the reasonable rule is that the company cannot defeat recovery on such policies, and for this reason that, after the preliminary steps have been regularly taken before the issuance of the policy by the insurance company, it can inquire into all the representations, warranties, etc., made by the insured, and is under no obligation to issue such policy until it feels satisfied that all matters are fully adjusted. Again, the company has sufficient time between the application for the policy and the issuance of the same to fully inquire into all matters preceding the granting of the policy, and it may be deemed negligence on their part if they do not avail themselves of this opportunity. (*b*) Most of the policies are incontestable after they have been in force for a certain time, as, for example, "This policy shall be incontestable after it has been in force three years,[3] after five years,[4] after two years.[5]

Effect of Incontestable Clause in Insurance Policy.—The foregoing has been merely explanatory of the nature of such policies and the language in which they are stated, also the various kinds of incontestable policies as regards the time when they shall become void, also how far they are incontestable. These matters are of a secondary consideration, and, therefore, the main question arises, (1) of the effect upon the insured, (2) upon the insurance company, and (3) how should such policies be construed in connection with the other clauses found in an insurance policy? There is not much doubt that when there is a clause in an insurance policy, making such policy incontestable either after delivery or acceptance or after it has been in force a certain time, that the company issuing such policies shall be estopped from setting up certain defenses.[6]

(1) *Effect on Insured.*—When such a policy is represented by the insurance company as incontestable, the insured can, on reading the clause, see immediately that such a policy will be of benefit to him, and in this manner it happens frequently that in the application for insurance some of the steps have been irregular, omissions have been made, the preliminary steps are in some cases irregular and not fully complied with, and such irregularities, according to the clause of incontestability, cannot be pleaded as a defense by the insurance company. Such errors or inaccuracies, etc., may have been such as to avoid the policy and prevent the recovery on the policy, if it had not been for such an incontestable clause, therefore it appears that such clause will be of great benefit to one insuring, since many of the minor errors and inaccuracies are put to rest and cannot be interposed since the company has estopped itself from setting up any of these defenses. The practice of rendering policies indisputable after a certain period has tended greatly to simplify the contract between the insurance company and the insured by setting at rest many points on which difficulty may arise. A declaration of indisputability covers many errors in the original document on which a policy was granted, unless these errors amount to a fraud. Again, suits are often prevented. The principle to be observed in these cases of incontestable clauses is that the insurance company is estopped to set up any defense except such as are reserved to itself in the policy, or except such as are put on the

[2] Goodwin v. Provident Saving Life Assurance Soc., 66 N. W. Rep. 157; Mareck v. Mutual Reserve Fund Assn., 62 Minn. 39, 64 N. W. Rep. 68; Simpson v. Life Ins. Co., 115 N. C. 393, 20 S. E. Rep. 517; Wright v. Mutual Ben. Life Assn., 43 Hun, 61, etc.; Wood v. Dwarris, 11 Exch. 493, 25 L. J. Exch. 129.

[3] Stark v. Union Central Life Insurance Company, 134 Pa. St. 45.

[4] Mareck v. Mutual Reserve Fund Life Association, 64 N. W. Rep. 68.

[5] Wright v. Mutual Benefit Life Association of America, 43 Hun, 61, etc.

[6] Goodwin v. Provident Saving Life Assurance Soc., 66 N. W. Rep. 157; Brady v. Prudential Insurance Company, 32 Atl. Rep. 102; Mareck v. Mutual Reserve Fund Life Assn., 64 N. W. Rep. 68; Wright v. Mutual Benefit Life Assn. of America, 43 Hun, 61; Mutual Reserve Fund Life Assn. v. Payne, 32 S. W. Rep. 1063; Wood v. Dwarris, 11 Exch. 1493, 25 L. J. Exch. 129; Wheelton v. Hardesty, 8 El. & Bl. 232, 27 L. J. Q. B. 241; Simpson v. Life Insurance Company, 115 N. C. 393, 20 S. E. Rep. 517.

ground of public policy; no policy, as has been stated above, can be absolutely incontestable, since fraud must always be allowed as a defense. Subject to the qualifications already stated all the cases on the subject of incontestable policies hold the same rule, that in case of such policy the insured may recover.[7]

In this case a policy was issued to plaintiff and the policy recited that it was issued in consideration of the representations, agreement and warranties made in the application. Upon the back of the policy was printed the following stipulation: "No question as to the validity of an application or certificate shall be raised unless such question be raised within the first two years from and after the date of such certificate of membership and during the life of the member therein named." Defendant company refused to pay on the ground that such representations and warranties were fraudulent. Court held, that the company was bound by its stipulation not to question the validity of the policy after the death of the member, and therefore entitled to recover the sum of $5,000, for which sum he had taken out the policy. This stipulation may be regarded as a short statute of limitation in favor of the insured, and during which time it had ample opportunity to test the validity of the policy. In Goodwin v. Prudent Saving Life Assurance Company,[8] a life insurance policy was given to the plaintiff with an incontestable clause in the application for the policy as follows: "Subject to the stipulation regarding payment of premiums and extrahazardous occupation, claims under this policy by death occurring two years or more after its date will be incontestable except for fraud in obtaining this policy." Assured four years later committed suicide. Company refused to pay the policy, and set up as a defense that he had made misrepresentations as to the stage of his health, place of his birth, use of intoxicating liquors, etc. Court held, none of these defenses availed as the policy was incontestable as to these matters, and plaintiff was entitled to recover. In case of Mareck v. Mutual Reserve Fund Life Assn.,[9] where the provisions were that the policy shall be void if the person engages in extrahazardous occupation, or if the insured die by his own hand he shall be paid a sum equal to the assessments with interest at six per cent. per annum. Across the face of the policy this was written in red ink, "after five years from the date of this certificate it is incontestable for any cause, except for non-payment of dues or mortuary assessments at the time and places and in the manner herein provided, the age of the applicant being correctly given in the application for this certificate." Insured died nine years after of his own hand, and it was held that the insured could recover. This clause was inserted by the company itself; being written across the face of the policy it is presumably the last expression of the agreement of the parties and most in the minds of the persons to the contract. It was written there for a purpose. The purpose was to make the policy incontestable for any cause after five years, subject only to two conditions, one was that the age of the insured had been correctly stated, and the other, that his dues and mortuary assessments had been paid. It seems that the ordinary mind would understand this as just what it says, and that it would apply to death from suicide as well as death from the causes specified in the paragraph of the insurance company. Same principle held in Brady v. Prudential Insurance Company.[10] In Simpson v. Life Insurance Company,[11] the policy provided that the policy should be incontestable after a certain time, also contained the clause rendering it of no force if the insured should die in consequence of the use of intoxicating liquors or opium, or in violation of the law. The quality of incontestability could, with no propriety, be predicated on this contract of insurance if it were still allowed to the insurer to dispute its liability to the insured for the "amount of insurance," upon the ground that the death was caused "by the use of intoxicating liquors or opium, or from the violation of law or any condition or agreement contained in this policy or the application upon which the policy is issued." If the insurance company could set up any such defenses against the insured it would not prevent it from setting up other defenses, and the policy would not be incontestable. In the case of Mutual Reserve Fund Life Asso-

[7] Wright v. Mutual Benefit Life Association of America, 43 Hun, 61, affirmed in 23 N. E. Rep. 186.
[8] (Iowa), 66 N. W. Rep. 157.
[9] (Minnesota), 64 N. W. Rep. 68.
[10] (Penn. 1895), 32 Atl. Rep. 102.
[11] 115 N. C. 393, 20 S. E. Rep. 517.

ciation v. Payne,[12] the facts were as follows: Action against insurance company; appeal from a judgment for plaintiff. Judgment affirmed. Suit was brought in June, 1894, by defendant in error against plaintiff in error on a policy of insurance issued to Joseph Payne, husband of the defendant in error. Policy for $3,000. There was a suicide clause in this policy stating that in case of suicide the company shall be liable only for the dues and six per cent. per annum. It was admitted that Payne committed suicide. On the face of the policy is the following: "No restriction as to travel. If this certificate shall be in continuous force until five years from date it shall thereafter be incontestable for any cause, except non-payment of dues or mortuary premiums at the times and in the manner hereinafter stipulated, provided the age of the member is correctly given in the application therefor." Payne took out policy December 8th, 1887, and committed suicide December 24th, 1893. Held, that the insured could recover.[13] "A policy of insurance was issued in favor of the mother of the person whose life was insured, which contained this provision: 'A certificate shall be incontestable for any cause except fraud or misrepresentation in the application or proofs or loss, or failure to report to the association any change of occupation that would make the risk any more hazardous.' Held, that the fact that the orders were not paid did not work a forfeiture of the policy as against the beneficiary therein, and that, as against her, the insurer was estopped from averring that the assessments acknowledged in the policy and in the 'binding receipt' to have been received was not paid. The language of the application and of the policy, declaring that the policy should be incontestable except for fraud, is unusually strong and clear. It is declared that if a binding receipt is issued, and its number inserted in the policy, the policy 'shall be incontestable.'" It seems clear that having made this express and strong statement, the association cannot be allowed to affirm as against the beneficiary, however it may be as to the insured, that the conditions precedent to the validity of the policy were not performed. The case of Wood v. Dwarris[14] is a much stronger one in favor of the insurer than the present one. In that case the policy itself contained an express stipulation that if any untrue statements were made it should be void; but in a prospectus issued by the company it was provided that all policies should be indisputable except in case of fraud; and it was held that, notwithstanding the provisions of the policy, the insurer could only avoid the policy for fraud. In the course of the opinion delivered in that case, Baron Alderman said: "When the plaintiff went to their office, the defendants professed to grant him an insurance on these terms, therefore they cannot set up as a defense that the statements in the proposal were untrue, for they have in fact said that they will never make any other defense." This case was approved in case of Wright v. Mutual Benefit, etc.[15] In Wheelton v. Hardisty,[16] it was said by Lord Campbell: "According to the case of Wood v. Dwarris, 11 Exch. 493, the equitable replication would be sufficient without a special fraud thus imputable to the fourth plea, and we ought to be bound by that decision, even if we doubted the propriety of it, but I must say that I heartily concur in it." There are other cases which recognize the general principle which applies here.[17] Incontestable policies of insurance are also found in force in England but they do not seem to have been brought up for adjudication to such an extent as here, although such policies are more common than in the United States.[18] From these cases it will be seen that clauses of incontestability in an insurance policy make the contract of insurance more simple since, as has already been stated, many of the minor and less material disputes likely to arise in a suit on a policy are forever set at rest and the contest will be confined to the important questions. The effect of an incontestable policy then, is, in the nature of a short statute of limitations; that after the policy has been in effect a certain time and after which time it shall

[12] 32 S. W. Rep. 1063.

[13] Kline v. Natural Benefit Assn., 111 Ind. 462, 11 N. E. Rep. 620.

[14] 11 Exch. 493.

[15] 43 Hun, 61, 35 Alb. L. J. 323.

[16] 8 El. & Bl. 232, p. 276.

[17] Wontner v. Sharp, 4 Man. G. & S., 408; Watson v. Earl of Charlemont, 12 Adol. & El. (N. S.) 863; Horwitz v. Equitable Insurance Company, 40 Mo. 557; Steele v. St. Louis, etc. Co., 3 Mo. App. 207.

[18] Wood v. Dwarris, 11 Exch. 493, 25 L. J. Exch. 494, 25 L. J. Exch. 129; Wheaton v. Hardisty, 8 El. & Bl. 232, 27 L. Q. B. 241.

become incontestable, the insurance company shall be barred from setting up any defense of which it can avail itself, except such as it specially reserves to itself. During the time that the policy shall be in effect, during the specified time mentioned, the insurance company has abundant time within which it can look into all matters relating to the health of the insured, his ability to pay the premiums, his habits of living, etc., and if the company sees fit not to discontinue the policy, and it does not contest it during that time, then after the policy has been in effect a certain specified time the company shall be precluded from all defenses; it is within the power of the company to find out all matters it wishes, and not doing so is the fault of the company, and it seems reasonable that the company should suffer for being negligent.

The effect, then, of an incontestable policy is, (1) to simplify the contract of insurance as between the company and the insured, (2) the company will be estopped or barred from setting up many of the defenses allowed other companies, and (3) such policies will be construed in favor of the insured.

Construction of Incontestable Clauses in Connection with Other Clauses in the Same Policies—How Construed—For Whose Benefit.—Having stated the rules as laid down as to the effect of the incontestable policies in barring the company from setting up certain defenses against insured, the next point for consideration is, how are such policies construed, when other clauses are contained in the policy? For this question we will have to look to the adjudicated cases, since the courts pass upon all question of construction. The greatest difficulty arises in cases where the policy states that it shall be void if the insured die by his own hand, and again when it also states in the same policy it shall be incontestable after a certain time. These two clauses must be taken together; it can be seen that if one is declared void the purpose of the policy is defeated, since the insurer will be defeated in recovering that for which he made the contract with the company. The only way in which this rule can be stated satisfactorily is to give the facts of the cases and state the principle as laid down. In the case of Goodwin v. Prudential Saving Life Assurance Society,[19] the court says: "The tenets established for the guidance of courts in such matters are well understood, and no one is better established than that in all cases the policy must be liberally construed in favor of the insured, so as not to defeat without a plain necessity his claim for identity; and when the words used may, without violence, be given two interpretations, that which will sustain the claim and cover the loss should be adopted.[20] And as said in the Wadsworth v. Trademan's Case,[21] we should adopt that construction which we think the insurer had reason to suppose we understood by the insured. The proper construction of this policy, taken in connection with the application, we think is that the policy does not cover death by suicide occurring within two years from the date of its delivery, but that after two years it is incontestable, except upon the grounds stated therein. This construction will give effect to all the provisions of the policy. In Mareck v. Mutual Reserve Fund Life Association,[22] there was a clause in the policy stating that if the insured die by his own hand an amount equal to the annual assessment shall be paid to him with six per cent. annually. There was also a clause written across the face of the policy stating: "This policy having been in force five years from date of acceptance shall be incontestable for any cause except non-payment of premiums, etc., provided that the age of the insured be properly given." The company contended that there were two separate and distinct risks in the contract: death by suicide, in a certain manner, death from any other cause paid in the usual manner, that the incontestable clause did not apply to the provisions in regard to suicide. But the court held that this was not the meaning of the incontestable clause, and said: "There are two or three elementary rules of construction that are peculiarly applicable to this class of contracts; they are to be liberally construed in favor of the insured, so as not to defeat, without plain necessity, the object

[19] (Iowa), 66 N. W. Rep. 68.

[20] Thomson v. Insurance Company, 136 U. S. 297, 10 Sup. Ct. Rep. 1019; National Bank v. Insurance Company, 95 U. S. 673; Wadsworth v. Trademan's Co., 132 N. Y. 543, 29 N. E. Rep. 1104; Ganeston v. Association, 36 N, W. Rep. 127; Collins v. Insurance Company, 64 N. W. Rep. 602.

[21] 132 N. Y. 543, 29 N. E. Rep. 1104.

[22] (Minn.), 64 N. W. Rep. 68.

of the policy. If there is a reasonable doubt as to the extent of the application of the "incontestable clause" it must be solved in favor of the beneficiary. If there is a doubt as to the meaning of the terms in the policy excepting the insurer from liability they are to be construed most strongly against him. A very recent case and one that is in line with the decisions above cited is Mutual Reserve Fund Life Association v. Payne.[3] The policy involved in this case contained, among other things, two clauses, as follows: "Death of a member by his own hand, whether voluntary of involuntary, sane or insane at the time, is not a risk assumed by the association on this contract, but in every such case there shall be payable, subject to the conditions of the contract, only a sum equal to the amount of the mortuary premiums paid by said member with six per cent. per annum, etc." On the face of the certificate was the following: "If this certificate shall be in continuous force for five years from date it shall thereafter be incontestable for any cause except non-payment of dues or mortuary premiums at the times and in the manner hereinafter stipulated, provided the age of the member is correctly stated in the application thereof." Payne took out insurance policy on the 8th of December, 1887, and committed suicide December 24th, 1893. Company claims that the incontestable clause did not include death by suicide. Court by Collard, J., held the part of the policy which declared that "death of a member by his own hand, etc.," should be construed in connection with the clause declaring it incontestable for any cause if it continues in force five years from its date. The policy should be construed most strongly against the insurer, and in case of ambiguity in the stipulation it should be construed against the company. Therefore Payne could recover the sum of $3,000, the amount of the insurance. From all the cases here cited the following is deduced: (1) There cannot be any absolutely incontestable policies of life insurance. (2) That incontestable clauses simplify the contract of insurance. (3) That the insurance company has the right to waive certain defenses except fraud. (4) That such insurance policies are construed in favor of the benefit of the insured.

Milwaukee, Wis. JACOB FEHR, JR.

[3] (Texas), 32 S. W. Rep. 1063.

MARRIAGE — COMMON-LAW MARRIAGE—EVIDENCE.

STEVENS v. STEVENS.

Court of Chancery of New Jersey, October 13, 1897.

Where it appears that the parties lived together as man and wife for several years, were known as such, acknowledged the relation by their daily actions and by express declarations to all persons with whom they came in contact; that both were competent to contract marriage; that the cohabitation was connubial from the start, and that the result of it was a child, yet living,—the marriage contract will be presumed, though there is a denial of a ceremonial marriage, it appearing that both parties are financially interested in avoiding the contract.

PITNEY, V. C.: The object of the bill is to obtain a decree of nullity of a marriage ceremony performed between the parties on the 10th of February, 1889. The ground relied upon for such decree is that at the time of the marriage the defendant, Kate Stevens, was the wife of one James Watt, and that he was and is still living. The undisputed facts in the case are that James Watt and the defendant lived together as man and wife for several years, in Jersey City, were known as such, and acknowledged the relation by their daily actions and by express declarations to all persons with whom they came in contact; that the result of such cohabitation was one child, born May 13, 1881, named Harvey Watt, still living, and acknowledged by James Watt to be his son. The physician who attended the defendant on the occasion of delivering her of this child made a report to the board of health and vital statistics of Hudson county that the child was born on the 13th of May, 1881; that its mother was Kate Watt, whose maiden name was Evans; and the father was James Watt. Some time about the year 1886 they quarreled, and separated, the defendant still going by the name of Mrs. Watt, and James Watt taking the son, and providing for him. Some time in the year 1888 the complainant, then a young widower, met the defendant. She was introduced to him as Mrs. Watt. According to his story,—and I think that in this respect he is reliable,—she told him that she had been married to James Watt, but that she had been divorced from him, and that her divorce papers were in her sister's custody; and, believing that, he went through a ceremony of marriage with her on the 10th of February, 1889, before Joseph Wilkinson, a justice of the peace of the county of Hudson, since deceased. The complainant swears that Wilkinson asked each of them the usual questions, and that the defendant stated that she was the divorced wife of one Watt. The original marriage certificate, signed by the justice, was produced before the master from the files at Trenton, and on the back of it was a certificate, signed by the complainant and the defendant, in their own handwritings, to the effect that "we, the parties named in the within certificate, hereby certify that the information herein

given by each of us is correct, to the best of our knowledge and belief." The certificate itself is in the usual printed form for marriage returns, furnished by the State bureau of vital statistics, with blanks to be filled in by the officer who performed the ceremony. I give so much as relates to the bride in full, as follows, the written parts being in italics: "(1) Full maiden name of wife: *Kate Evans*. Country of birth: *Pennsylvania*. (2) Place of residence: *115 Van Horn St., Jersey City, N. J.* (3) Age, nearest birthday: *30*. (4) Last name, if a widow [a pen line through the printed words 'a widow']: *Divorced Watt*. Number of bride's marriage: *Second*. (5) Name of father: *Harvey Evans*. Country of birth: *Pa*. (6) Maiden name of mother: *Elenor Sincox*. Country of birth: *Pa*."

Defendant hardly denies that she gave this information to the justice. She does not deny that it is accurate in all respects except as to her being divorced and the marriage being a second one; and the evidence discloses no means by which the justice could have obtained the information as to her pedigree except from her in person. One of the witnesses to the marriage swears that she heard the justice ask the defendant whether she was a widow or divorced, and that she said she was neither; and the defendant swears to the same thing, but she is unable to account for the details of information contained in the certificate being given to the justice except by herself; and the witness is shown by her cross-examination not to be reliable. It is suggested that this assertion of a prior marriage and divorce was a mere ruse, resorted to for the purpose of satisfying the curiosity of the justice, who had heard the defendant called Mrs. Watt. I think this explanation unsatisfactory. In fact, it does not appear clearly that the justice had observed that she had been called Mrs. Watt. He had no previous acquaintance with her; was simply called in to perform this ceremony; and if it did happen that he heard her called Mrs. Watt I think that circumstance could have been explained more easily than to have resorted to the cumbrous fiction of a prior marriage and divorce.

Complainant swears that after they had lived together for about six years they quarreled, and separated, and that he entered into an agreement to pay her $15 a month for her support; that shortly before filing the bill he ascertained that she had never been divorced from Mr. Watt, and declined to pay any further alimony. The defendant and James Watt both swear that they never were divorced, but they further swear that there never was any marriage ceremony between them. His language on direct examination is this: "I was never married to her; never signed any contract that she and I should live together as wife and husband." He further swears: "She was known as Mrs. Watt all the time we lived in Jersey City. They always took her for such. She was addressed as Mrs. Watt by people in my presence. I never objected against it. I know people took her for my wife and me for her husband. Neither of us objected, as I know of. When I say I was never married to her, I mean that no mariage ceremony was ever celebrated between us." The defendant, called in her own behalf, denies the marriage in these words: "I was never married to Mr. Watt." She does not deny that there was a contract of marriage between them, unaccompanied by the sanction of a magistrate or clergyman.

With regard to the state of the law in New Jersey in respect to what are called common-law or non-ceremonious marriages, I refer to the following cases: Pearson v. Hovey, 11 N. J. Law, 12, a common-law action of dower, in which the question was whether the demandant was lawfully married to the decedent. The marriage ceremony was actually performed by a justice of the peace outside of the county for which he was commissioned, and the question was as to the legality of such a marriage. The three judges—Chief Justice Ewing, Justice Ford, and Justice Drake—concurred in holding that the justice might perform the ceremony in any county. Justice Ford went further, and said: "The parties joined together were not related within any prohibited degree, nor under any disability for want of age or understanding. They were free, able, and willing, as it respected themselves, and they contracted marriage before him [the justice of the peace] in words of the present tense, taking each other as husband and wife. I consider it to have been long and fully settled at law that such is a valid marriage, even if William Harrison, Esq., had not been a justice of the peace. It is a maxim in the common-law, as ancient as the law itself, that '*consensus, non concubitus facit nuptias*.' It is the contract that makes the marriage. Such, also, has ever been the law or maxim of the church in all ages, as well as the common-law. He then cites various old English authorities in support of his position, and says: "The common-law requires nothing more of parties who are under no legal disability than proof of a contract, made in words of the present time, as, 'We take each other now;' not that 'we will, at a future time, take each other,' for this amounts to no more than an engagement which may never be fulfilled." He then holds that the statute which authorizes certain persons to perform the marriage ceremony is not restrictive, and does not alter the common law in this respect. In Voorhees v. Voorhees, 46 N. J. Eq. 411, 19 Atl. Rep. 172, at page 413, 46 N. J. Eq., and page 173, 19 Atl. Rep., Vice Chancellor Van Fleet says, "Two essentials of a valid marriage are capacity and consent." And on page 414, 46 N. J. Eq., and page 173, 19 Atl. Rep. he says: "Marriage is a civil contract, and no ceremonial is indispensably requisite to its creation. A contract of marriage made *per verba de præsenti* amounts to an actual marriage, and is valid,"—quoting O'Gara v.

Eisenlohr, 38 N. Y. 296. The same rule prevails in Pennsylvania. Richard v. Brehm, 73 Pa. St. 140; Smith v. Smith, 52 N. J. Law, 207, 19 Atl. Rep. 255, was also an action of dower, and the question was whether the demandant was lawfully married to the decedent. The demandant became acquainted with the decedent in Vermont, and when they proposed to get married suddenly in Vermont they met with some statutory difficulties, and decided to go to Massachusetts to be married, and for that purpose proceeded to an hotel in Charlestown. From there the demandant was conducted by the decedent to a house, and introduced to a gentlemen who the decedent said was a minister, and the ceremony was there performed. There was no proof whatever that he was a clergyman, but the demandant believed him to be such. The statute of Massachusetts validated such a marriage, even though the man was not a clergyman. Mr. Justice Scudder, speaking for the court of errors and appeals, said: "There is nothing in our law or in any statute of this State which would make such a marriage as this invalid if performed here, and there is no reason why it should not be here recognized as entitling the demandant to dower in her deceased husband's land." There was in that case, as is well known, a second marriage by Smith, the husband, while his first wife, the demandant, was living.

Upon the probative value of cohabitation with what is called matrimonial habit and repute, I cite as follows: The case of East Windsor v. Montgomery, 9 N. J. Law, 39, was a contest between two townships under the poor laws, and the question was whether a certain pauper had gained a settlement by marriage. There was an actual marriage proven, but the allegation was that the husband, John Robeson, had a wife living in Ireland when he married the pauper. There was no direct proof of the previous marriage, but it was proven by the daughter of Robeson that he lived with her mother in Ireland as husband and wife; "that they were esteemed, reputed, and believed by their neighbors, acquaintances, relations, and friends as lawful husband and wife, and as such visited and received by them;" and that her father did always and upon all occasions acknowledge and declare her mother to be his wife; and that they must have lived together eight or nine years before her father left Ireland. It was held by the supreme court that the evidence of cohabitation with matrimonial habit and repute was sufficient to establish a prior marriage. This result was reversed on appeal by the old court of errors and appeals, but on what ground does not appear. In Wilson v. Hill, 11 N. J. Eq. 143, there was one husband and two wifes,—Frances and Catharine. Frances claimed to have been married to the husband in 1839 in Massachusetts. Catharine was married to him many years later in New Jersey. The fact of the marriage with Frances was not proven either by any record or by the testimony of any witness present at the ceremony, but it was proven by numerous and unimpeached witnesses that the parties—Frances and the husband—lived together, cohabiting as, and were reputed to be, man and wife, for many years previous to the date of this transaction; that during such cohabitation she had two children, which were recognized by the husband as his; that in the year 1847, while the husband and Frances were so living together, a deed was executed to her of a tract of land, which contained this clause: "Which tract or parcel of land is conveyed to the said Frances Hill, wife of Josiah, and to her heirs and assigns forever," etc. The husband frequently joined with Frances in deeds of conveyance of property, and united with her in the acknowledgment of these instruments as husband and wife. When her husband, however, was arrested for bigamy, and complaint was made before the grand jury, Frances went before the grand jury, and swore that she had never been married to him, that she was not his wife, that the connection between them was a partnership, and she then had abandoned the use of his name. Nevertheless, Chancellor Green held that she was his lawful wife, with all its consequences. In Fenton v. Reed, 4 Johns. 52, the question was as to whether or not a certain Mrs. Reed was the widow of William Reed. She was the wife of one Guest, who abandoned her in 1785, and seven years afterwards she, believing Guest to be dead, married Reed. Guest returned to New York after this second marriage, but never interfered with the relations between his wife and Reed, and died in 1800. After that she continued to live with Reed until his death, in 1806. The supreme court held that the court below was justified, on the evidence, in inferring a common-law marriage with Reed after the death of Guest, in 1800. The same principle was conceded in Wallace's Case, 49 N. J. Eq. 534, 535, 25 Atl. Rep. 260, but it was shown there that the commencement of the sexual intercourse was meretricious, and the subsequent cohabitation as man and wife was very slight, and supported by insufficient evidence, and so a marriage was not presumed. This same principle was applied in Chamberlain v. Chamberlain, 71 N. Y. 423, where the presumption of marriage from cohabitation as man and wife was overcome by the circumstances of the particular case. Clayton v. Wardell, 4 N. Y. 230, was this: A man was arrested under the bastardy act as the putative father of a child with which a woman was pregnant, and entered into recognizances to answer the charge; and no further proceedings were had. There had been no previous matrimonial habit and repute. He then at once went to live with the female as her husband, and continued to do so until some time after the child was born and died, when he separated from her, and they entered into the usual articles of separation between husband and wife, in which they spoke of each other as husband and wife, and in which a third person indemnified the husband against any claim of the

wife. Shortly after this the woman went through the ceremony of marriage and lived for years with another man as his wife, and had one child, and the question was as to the legitimacy of this child, the offspring of the first connection being dead. The surrogate before whom, as judge, the question first came, held that the first marriage was established. His decision was reversed by the supreme court, and such reversal was sustained, on appeal, by the opinions of Harris, Ruggles, Hurlbut, Taylor, and Pratt, JJ., against Chief Justice Bronson, and Judges Jewett and Gardiner. There was no proof of any formal marriage between the man and the alleged first wife, and the decision of the majority of the court was arrived at upon the ground that the intercourse between the parties was, in its commencement, meretricious, and there was perhaps as much reason to believe, that their subsequent connection was of the same character as that a marriage had in fact taken place; and for that they cite the opinion of Lord Eldon in Cunninghams v. Cunninghams, 2 Dow. 482. On the other hand, the opinions of Judge Gardiner and Chief Justice Bronson and Judge Jewett were that the cohabitation and holding themselves out to everybody as man and wife, and the entering into the articles of separation as such, were sufficient proof of an actual marriage.

A perusal of the opinions on either side in this case convinces me that the minority were in the right, and I think it probable that their views would have prevailed but for the fact that the effect would have been to bastardize a living issue of a ceremonial marriage. An interesting case is *In re* Taylor, 9 Paige, 611. Taylor married, and had four children by a wife who died shortly after the birth of the last child, and a year later took to his bed a housekeeper or servant, who has been in his house all the while, lived with her for 10 or 12 years, and had two or three children by her. There was no proof of a ceremonial marriage, but he introduced her to all his friends as his wife, and entered the names of her children in the family register. In 1816, Taylor went to England, and left his family in New York, and while there this second wife or mistress, whichever she was, wrote him a letter, which was produced in evidence, in which was an admission on her part that there had been no ceremonial marriage between them, and he himself also made the same statement in writing on his return. It was held by Chancellor Walworth that the living in matrimonial habit and repute with the second woman for so many years, and having children by her, was sufficient to enable the court to presume a common law marriage between them, and that this view could not be overcome by the admissions of Mr. and Mrs. Taylor, made subsequently, and therefore not a part of the *res gestæ;* and he declared the issue of the second connection to be legitimate. It is impossible not to discover in all these cases a disposition on the part of the court to hold in favor of the marriage where there is issue which may be bastardized by a contrary ruling. And the same is to be said of the much debated cases of Campbell v. Campbell (1867), L. R. 1 H. L. § 182 (Breadalbane Case), and De Thoren v. Attorney-General (1876), 1 App. Cas. 687, referred to by Mr. Justice Garrison in his dissenting opinion in Collins v. Voorhees, 47 N. J. Eq. 315, 20 Atl. Rep. 676, on appeal from Voorhees v. Voorhees, 46 N. J. Eq. 411, 19 Atl. Rep. 172. In the English cases just cited the intercourse between the parties had an unlawful beginning. At its inception one of the parties in each case was incapacitated to marry by reason of preconnubial contract, not dissolved by death or divorce, and in each the connubial intercouse continued after the impediment was removed. In the Breadalbane Case the incapacity was known to both of the parties. In the case of De Thoren v. Attorney-General, it was unknown to both the parties. The house of lords held that the unlawful inception, under the peculiar circumstances of those cases, did not prevent the prevalence of the presumption, arising from the continued matrimonial habit and repute, that a marriage contract was actually made after the removal of the impediment. This court and the court of appeals (47 N. J. Eq. 555, 22 Atl. Rep. 1054), held the contrary upon the circumstances of the case in Collins v. Voorhees, where one of the parties knew of the impediment and the other did not. In both of our courts, however, the sufficiency of the proof by matrimonial habit and repute, and the validity of a non-ceremonious marriage, was recognized; but the probative proof in that case was held to be overcome by the circumstances that its origin was shown to be illegal by reason of incapacity of one of the parties, due to precontract.

In the case in hand there is nothing to show any want of capacity to contract between Watt and the defendant when they commenced their cohabitation. Both were competent to contract marriage, and, so far as appears, the cohabitation was connubial from the start. There is no proof, as in Clayton v. Wardell, *supra*, that the connection commenced meretriciously, or that legal measures were resorted to by the defendant to compel Mr. Watt to live with and support her, or that she was a woman of loose character, as in Chamberlain v. Chamberlain, *supra*, and avowedly accepted the position of a mere mistress. In fact, the indications are that the parties here, as in the two cases in the house of lords, were faithful spouses to each other during the entire period of their cohabitation. If the question here was as to the legitimacy of the issue of this connection, the evidence would be ample and well nigh conclusive to sustain it, even as against the denial by the parents of a ceremonial marriage. Such was the opinion of Chancellor Walworth in *Re* Taylor, *supra*, and of Chancellor Green in Wilson v. Hill, *supra*. That denial, however, as I read it and construe it, does not necessarily include a

private parol contract of marriage, in which they, in substance, said to each other, "Let us be husband and wife, and live together as such." And in considering what weight is due here to the denial of marriage, it must be borne in mind that both Watt and the defendant are interested in sustaining the latter marriage. The defendant is interested in retaining her separation contract with complainant, and Watt is interested in being relieved of any duty to the defendant. I think the clear weight of the evidence is that there was such a contract, and if there was such a contract accompanied as it was by actual connubial cohabitation, it is binding on the parties, and cannot be laid aside at their pleasure. They may have supposed that it was not binding because non-ceremonious, and this supposition may account for their subsequent conduct. In this connection it must be observed that the well settled rule is that presumption of marriage in such a case is very strong, and not to be easily overcome. Piers v. Piers (1849), 2 H. L. Cas. 331; De Thoren v. Attorney-General (1876), 1 App. Cas. 686. Against this view is urged what was said by me in the case of Rooney v. Rooney, 54 N. J. Eq. 231, 34 Atl. Rep. 682, namely, that, "in a suit for nullity by reason of precontract with a living person, strict proof is required of such prior contract." But whatever was there said on that subject must be construed in connection with the circumstances of that case, namely, that a party who comes into a court of justice, and asks for a decree of nullity of marriage, and the bastardizing of the issue thereof, by reason of his own precontract with a living person, of which he was himself conscious when he entered into the contract, must make such proof clear. If there had been issue of the marriage between the parties to this suit, and the defendant was suing the complainant for a decree of nullity by reason of her precontract with Watt, and the result of the decree was to bastardize issue, then the ruling in the case of Rooney v. Rooney would be more in point. As it is, I do not think it applies. I will advise a decree for the complainant.

NOTE.—All States have statutes providing for the celebration of marriages; what permission must be obtained or notice given before the marriage; who must perform the marriage and what record of the marriage must be made; but generally such provisions do not affect the validity but only the legality of the marriage. Meister v. Moore, 96 U. S. 76, 14 Amer. & Eng. Encyclopedia of Law, p. 514. Whether or not any of such provisions must be complied with to render the marriage valid depends: 1st, upon whether by the pre-existing common or unwritten law any such formality were necessary, and 2d, whether if they were not, there is a provision in the statute stating that non-compliance with it shall render a marriage void, and it is a general rule that no celebration of marriage is necessary at all, except in States in which it is held that a celebration was necessary at common law and in States where the statute, as in Kentucky, contains words of nullity. 14 Amer. & Eng. Encyclopedia of Law, 514. No celebration of course is necessary by the law of nature. Richard v. Brehm, 73 Pa. St. 140. Whether or not one is necessary by the common law of England is doubtful. In England, after much hesitation, it is settled that it is (Beamish v. Beamish, 9 H. L. Cas. 274); and this view has been upheld in Maryland (Denison v. Denison, 35 Md. 361), Massachusetts (Com. v. Munson, 127 Mass. 459; Norcross v. Norcross, 29 N. E. Rep. 506), and North Carolina. State v. Samuel, 2 Dev. & B. 177. But the contrary has been held by the United States Supreme Court, and in most of the States. Meister v. Moore, 96 U. S. 76; Campbell v. Gullatt, 43 Ala. 57; Graham v. Bennett, 2 Cal. 503; Sharon v. Sharon, 75 Cal. 1; Askew v. Dupree, 30 Ga. 173; Post v. Post, 70 Ill. 484; Blanchard v. Lambert, 43 Iowa, 228; Hutchins v. Kimmell, 31 Mich. 126; State v. Worthingham, 23 Minn. 528; Hargroves v. Thompson, 31 Miss. 211; Dyer v. Brannock, 66 Mo. 391; Carmichael v. State, 12 Ohio St. 553. When a marriage is proved by the fact that the parties lived together and were reputed to be husband and wife, it is said to be proved by cohabitation and repute. The facts that parties have publicly acknowledged each other as husband and wife, have assumed marriage rights, duties and obligations, have been generally reputed in the place of their residence to be husband and wife, are relevant to prove a contract of marriage between them and consequently, in cases where no celebration is necessary, a valid marriage. Kan. Pac. R. Co. v. Miller, 2 Colo. 442; Barnum v. Barnum, 42 Md. 251; Com. v. Hurley, 14 Gray (Mass.), 411; Boone v. Purnell, 28 Md. 607; Green v. State, 59 Ala. 68; Bowers v. Van Winkle, 41 Ind. 432; Miller v. White, 80 Ill. 580; Proctor v. Bigelow, 38 Mich. 282; Redgrave v. Redgrave, 38 Md. 93. Where parties live together ostensibly as man and wife demeaning themselves toward each other as such, and are received into society and treated by their friends and relations as having and being entitled to that *status*, the law will, in favor of morality and decency, presume that they have been legally married. Redgrave v. Redgrave, 38 Md. 93. Such presumption is generally rebutted by showing that the parties intended their connection to be illicit or that there was an impediment to their marriage. Myatt v. Myatt, 44 Ill. 473; Goldbeck v. Goldbeck, 18 N. J. Eq. 42. The following are the late cases on the subject of marriage by cohabitation and repute. The origin of the relation between plaintiff and defendant was meretricious. Though the cohabitation extended over 20 years, defendant's sister testified that at the end of that period plaintiff told her that she had not been married to defendant. To strangers, defendant spoke of plaintiff as Mrs. F, (F being defendant's name). He also addressed two letters to her as Mrs. F. Their companionship was restricted to their own apartments, where he seldom appeared in the daytime. Plaintiff was excluded from the acquaintance of defendant's relatives and friends; and defendant did not make calls or visits with her, or take her to places of amusement. Held, that the original relation had never changed into a matrimonial cohabitation. Fagan v. Fagan, 11 N. Y. S. 748, 57 Hun, 592. Cohabitation for about five months between a man and a woman who was keeping house for him, without proof of when it commenced, and the fact that he recognized her in his will as his wife, are not sufficient proof of reputation of their being husband and wife to support a common-law marriage, in view of the man's contradictory statements in that respect, and of a serious misunderstanding having arisen between him and his children from his relations with the woman. Ben. Assn. v. Carpenter

(R. I.), 24 Atl. Rep. 578. A common-law marriage is not established by proof of cohabitation alone, where the parties do not hold each other out as husband and wife. Stans v. Baitey (Wash.), 37 Pac. Rep. 316. A marriage will not be presumed from the mere fact that the parties live together, where their relations were meretricious in their inception. Ahlberg v. Ahlberg (Super. N. Y.), 24 N. Y. S. 919. A decree dismissing a bill for divorce on the ground that there had been no marriage will not be disturbed where no marriage ceremony was ever performed, and there is evidence that the parties, though living and passing in society as husband and wife, on various occasions stated, for the purpose of showing that such was not their relation, that they were not married. Van Dusan v. Van Dusan, 56 N. W. Rep. 234, 97 Mich. 70. Where a man keeps house with a woman whom he calls his wife, introduces her as such, receives friends and relatives at his house as a married man, and he and the woman visit them as man and wife, and he has children who are christened as the offspring of this cohabitation, taking his name, and are universally looked upon as legitimate, a presumption of marriage arises, and the abandonment of the reputed wife, and his declarations that the children are illegitimate made after the abandonment, and his last will, in which he ignores the reputed marriage, are not sufficient to rebut the presumption. Bothick v. Bothick (La.), 14 South. Rep. 293, 45 La. Ann. 1382. Where the relations existing between a man and woman were originally illicit, their action in passing in society as husband and wife will be regarded as induced by a desire to conceal the illicit relation, and not as an acknowledgment that they recognized the marital relation. Crymble v. Crymble, 50 Ill. App. 544.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ACCIDENT INSURANCE — When Policy Takes Effect.—Where an application for accident insurance is made to an agent of a mutual association, who has no authority to accept a person to membership, and who has to sendthe application to the association by mail for acceptance, on such acceptance and issuance of the certificate of membership the latter does not relate back to the time the application was made, in the absence of anything in the application that binds the association in the interim of time; and in case of accident to the applicant after the application is made, and before its acceptance, the association is not liable.—ROGERS v. EQUITABLE MUT. LIFE & ENDOWMENT ASSN., Iowa, 72 N. W. Rep. 539.

2. ACKNOWLEDGMENT—Seal—Under Rev. St. 1873, p. 430, which requires the certificate of acknowledgment of a renunciation of dower to bear the signature and seal of the notary, the omission of the seal is a fatal defect.—BRATTON v. BURRIS, S. Car., 28 S. E. Rep. 13.

3. ADVERSE POSSESSION—Extent.—The presumption that possession of land extend to the entire congressional subdivision called for by the occupant's conveyance or claim of right, does not obtain, where, with his knowledge, and that of his grantors, another person has been in possession of a part of the subdivision, under a color of title or claim of right for more than 10 years.—LIBBEY v. YOUNG, Iowa, 72 N. W. Rep. 520.

4. ALTERATION OF INSTRUMENT — Evidence.—Proof of the due execution of a note which bears on its face no appearance of alteration is sufficient foundation for its admission in evidence, and casts on defendant the burden of proving an alteration, and that it was made after the note was executed.—COSGROVE v. FANEBUST, S. Dak., 72 N. W. Rep. 469.

5. BILL OF EXCEPTIONS — Record.—In order to make the bill of exceptions a part of the record, it must appear that it was filed with the clerk after being authenticated by the signature of the judge.—SHERWOOD v. STATE, Ind., 47 N. E. Rep. 936.

6. APPEAL—Final Decree.—A decree sustaining the demurrer of the individual defendants to a bill against a corporation and its officers, and dismissing the bill as to them, leaving it pending against the corporation, is not a final decree from which appeal will lie.—LANG v. INGALLS ZINC CO., Tenn., 42 S. W. Rep. 198.

7. APPEAL — Record — Bill of Exceptions.—The evidence is not properly in the record when it does not appear that the longhand manuscript thereof was filed before it was incorporated in the bill of exceptions.—SEISS v. CLEVELAND, ETC. ST. L. RY. CO., Ind., 47 N. E. Rep. 935.

8. ARCHITECTS—Services—Evidence of Value.—Testimony as to the length of time spent by an architect on certain plans and specifications is admissible on the question of the value of his services in preparing the same, the jury not being limited to a consideration of the expert testimony on that question.—EHLERS v. WANNACK, Cal., 50 Pac. Rep. 483.

9. ASSOCIATION—Racing Association—Rules of Jockey Club—Reasonableness.—A rule adopted by the jockey club, and made binding by Laws 1895, ch. 570, upon associations organized under that act, which rule requires the exclusion from race meetings of a person ruled off the turf for improper practices, is not an illegal restriction upon a franchise enjoyed by such an association, nor upon the rights of the public in such franchise; invades no right of a person not a member of such association; violates no contract; takes away no property or vested right; and is not illegal.—GRANNAN v. WESTCHESTER RACING ASSN., N. Y., 47 N. E. Rep. 697.

10. ATTACHMENT — Joint Obligors.—An attachment may issue against the principal of a note alone, though

there is a surety thereon, amply able to pay.—RICHARDSON v. PROBST, Iowa, 72 N. W. Rep. 521.

11. ATTACHMENT — Wrongful Suing Out of Writ.—Where two creditor firms, each in its own interest, in separate actions, simultaneously, through the same attorneys, on the same alleged grounds, wrongfully sued out writs of attachment against the property of their common debtor, which were so levied by the same officer on the same property that one claimed a prior lien on real estate and the other on personal property, they were not joint wrongdoers; and therefore the recovery of a judgment for damages for such wrongful attachment against one of them, and the satisfaction thereof, constituted no bar to the right of the attachment defendant to recover for such damages as against the other.—MILLER v. BECK, Iowa, 72 N. W. Rep. 553.

12. BILLS AND NOTES — Fraudulent Representation.—A statement by the promoter of a corporation that stockholders would receive from 10 to 25 per cent. on their money paid for stock is an expression of opinion, and the fact that the corporation became insolvent and ceased to do business six months later does not invalidate a note given in payment for stock.—SWAN v. MATHRE, Iowa, 72 N. W. Rep. 522.

13. BILLS AND NOTES — Demand — Notice.—Presentment and demand on one of two makers of a note is not sufficient to hold the indorser.—OLOSZ v. MIRACLE, Iowa, 72 N. W. Rep. 502.

14. BILLS AND NOTES—Promissory Note — Grace—Alteration.—Upon a promissory note due otherwise than at sight or on demand, and payable at a chartered bank in this State, the maker is entitled to three days of grace, and a waiver of demand, protest, and notice of non-payment is not a waiver of the right to days of grace. An alteration in such a note made by the holder, with intent to defraud the maker, which consisted in inserting in the note the word "fixed," the legal significance of which was to render the note payable absolutely upon the day named therein, thus excluding the three days of grace, is a material alteration, which changes the obligation of the maker; and in a suit upon such a note a plea alleging such facts was improperly stricken on demurrer.—STEINAU v. MOODY, Ga., 28 S. E. Rep. 30.

15. BILLS AND NOTES—Seal — Negotiability.—Affixing a corporate seal to the note of a corporation does not destroy its negotiability; Comp. Laws, § 3549, abolishing all distinctions between sealed and unsealed instruments, being restricted only by section 4849, limiting the period within which an action on a sealed instrument can be commenced.—LANDAUER v. SIOUX FALLS IMP. CO., S. Dak., 72 N. W. Rep. 467.

16. BUILDING ASSOCIATION—Mortgages — Marshaling Securities.—Under the rule of marshaling securities, the association was required to reduce its demand by the amount of the withdrawal value of the shares, if it had notice of the second mortgage, and the premises proved insufficient to pay both debts.—MERCHANTVILLE BUILDING & LOAN ASSN. v. ZANE, N. J., 38 Atl. Rep. 420.

17. CANCELLATION OF INSTRUMENT — Fraud.—The written instrument of a person, entered into by him with another, and on which contractual rights between the two are founded, cannot be impeached by such person, upon the ground that he had been fraudulently induced to execute it, by slightly more evidence than is adduced in its support. In such case the evidence of fraud should be clear, decided, and satisfactory, and it is error to instruct that "the preponderance of evidence need only be slight, so that the jury are enabled to say there is a little more evidence upon the one side than upon the other."—KANSAS MILL OWNERS' & MANUFACTURERS' MUT. LIFE INS. CO. v. RAMMELSBERG, Kan., 50 Pac. Rep. 446.

18. CARRIERS — Live-stock Contract — Limitation of Liability.—Where a railroad company prints rules and regulations for the transportation of live stock at the top of a sheet of paper on which is printed the live-stock contract, and in the contract refers to the rules and regulations as follows: "That whereas, the said St. Louis & San Francisco Ry. Co., as aforesaid, transports live stock only as per above rules and regulations,"—held, that the rules and regulations form no part of the contract.—ST. LOUIS, ETC. RY. CO. v. TRIBBEY, Kan., 50 Pac. Rep. 458.

19. CARRIERS — Misdelivery of Property.—Where a common carrier misdelivers property shipped over its road, the consignee is not bound to accept a tender thereof made more than three weeks after the expiration of the time during which he agreed to extend the period of delivery, and after he had brought suit against the carrier for the conversion of the property.—HAMILTON v. CHICAGO, M. & ST. P. RY. CO., Iowa, 72 N. W. Rep. 529.

20. CARRIERS OF GOODS — Carriage by Sea—Exceptions in Contract.—By the law of both England and America the ordinary contract of a common carrier by sea involves an obligation to use due care and skill in navigating the vessel and carrying the goods; and an exception, in the bill of lading, of perils of the sea, or other specified peril, does not excuse him from that obligation, nor exempt him from liability for loss or damage from one of those perils to which the negligence of himself or his servants has contributed.—COMPANIA DE NAVIGACION LA FLECHA v. BRAUER, U. S. S. C., 18 S. C. Rep. 12.

21. CARRIER OF GOODS—Delay in Delivery.—In an action to recover damages for delay in delivery of cattle shipped under a written contract which specified no particular time of delivery, evidence that the carrier's agent who made the contract promised to deliver the cattle at a certain time was inadmissible, even for the purpose of ascertaining what knowledge, if any, the carrier had of the particular market day with reference to which shipment was made.—GULF, C. & S. F. RY. CO. v. BAUGH, Tex., 42 S. W. Rep. 245.

22. CARRIERS OF PASSENGERS—Injury—Negligence.—A passenger who, being carried beyond his station because asleep, is permitted to alight at a place other than a station, and who, after walking some distance on the track, falls into a culvert thereon, cannot recover for the injury therefor from the railroad company.—FISHER v. PAXON, Penn., 38 Atl. Rep. 407.

23. CARRIERS OF PASSENGER—Ticket as Evidence of Contract.—A passenger may, in the absence of actual notice to the contrary, assume that the carrier has furnished him with a ticket correctly stating the terms of the contract actually made, and is not bound to inspect the ticket to see that the carrier has performed its duty.—GULF, C. & S. F. RY. CO. v. COPELAND, Tex., 42 S. W. Rep. 239.

24. CONSTITUTIONAL LAW—Unjust Discriminations—Game.—Acts 1896, No. 98, prohibiting fishing for profit in two counties by citizens of other counties without license, and without limitation upon the fishing rights of residents of such two counties, is an unjust discrimination, and repugnant to Const. art. 1, § 5, providing that no person shall be denied the equal protection of the law.—STATE v. HIGGINS, S. Car., 28 S. E. Rep. 15.

25. CONTRACT — Evidence—Damages. — In an action for damages for breach by the vendor of a contract to sell promissory notes of a third person, it is not permissible to prove declarations of a stranger as to what he would be willing to give for the notes, such evidence not tending to prove value. — WINSIDE STATE BANK v. LOUND, Neb., 72 N. W. Rep. 486.

26. CONTRACT — Speculative Damages.—Profits upon the sale of town lots at prices beyond their present market value, and which depend for their realization upon the working up of a "boom," and upon the contingencies and uncertainties of the future, are speculative and conjectural in character, and cannot be allowed as damages for the breach of a contract.—CARBONDALE INV. CO. v. BURDICK, Kan., 50 Pac. Rep. 442.

27. CONTRACT WITH AGENT—Liability of Principal.—Where it is sought to hold a principal liable on a con-

tract made by his agent, and the authority of the agent to make the contract is one of the issues being tried, unless there is some evidence to show that the agent had authority to make the contract, it is error for the court to instruct the jury that they may determine whether the agent had authority to make such contract.—NEBRASKA WESLEYAN UNIVERSITY v. PARKER, Neb., 72 N. W. Rep. 470.

28. CONVERSION—Specific Money.—Trover lies for the failure to deliver to plaintiffs money, as such, where the declaration shows that defendant received the money in question simply for safe keeping, the money in question to plaintiffs on demand, and that, instead of discharging the duty thus devolved on him, he wrongfully converted the money to his own use.—ROYCE v. OAKES, R. I., 38 Atl. Rep. 371.

29. CORPORATION—Dissolution—Receiver—Upon the appointment of a receiver in a proceeding for the voluntary dissolution of a corporation, he becomes a trustee for the creditors of such corporation, whether or not their *status* as such creditors is then ascertained; and the statute of limitations does not thereafter run against the claims of such creditors, so long as the trust is open and continuing.—LUDINGTON v. THOMPSON, N. Y., 47 N. E. Rep. 903.

30. CORPORATION—Foreign Corporations.—In an action by a foreign corporation on a note made and payable in the State, it will be presumed that plaintiff has complied with Laws 1895, ch. 47, prescribing the conditions on which foreign corporations may do business in the State, where failure to comply does not appear on the face of the petition, and the petition need not allege compliance.—ACME MERCANTILE AGENCY v. ROCHFORD, S. Dak., 72 N. W. Rep. 466.

31. CORPORATIONS — Insolvency — Preferences.—The word "employees" in Laws 1885, ch. 376, providing that where a receiver of a corporation is appointed, the wages of its employees, operatives, and laborers shall be preferred in the distribution of its assets, is a word of larger import than the words "operatives and laborers," and is not confined to those who perform manual labor only. Accordingly, held, that an employee of a corporation, whose duties are to go from place to place, and set up, put in operation, and repair machines made by such corporation, as well as to sell or solicit sales of machines, and who receives a compensation of $100 per month, is entitled to the preference given by the statute.—PALMER v. VAN SANTVOORD, N. Y., 47 N. E. Rep. 915.

32. COVENANTS—Release — Pleading.—After execution and delivery of a warranty deed, wherein the vendors covenanted that the premises were free from taxes, and on the same day, the vendee gave the vendors a mortgage on the premises, in which he expressly agreed to pay all taxes, "then subsisting" or which might thereafter be imposed on the property. At the time these instruments were executed, the property was incumbered by taxes: Held, that the agreement in the mortgage, in the absence of fraud or mistake, superseded the covenant in the deed, and released the vendors from liability.—FRANK v. COBBAN, Mont., 50 Pac. Rep. 423.

33. CREDITORS' SUIT—Mortgaged Property—Proceeds.—In a creditors' suit involving property covered by a chattel mortgage, where a receiver is appointed and directed to sell certain specific property, and apply the proceeds on the mortgage, the mortgagee must not be charged expenses necessarily incurred in handling and taking care of the property, for watchmen, and insurance prior to the sale, or for so much of the rent of the debtor's leasehold and taxes as is chargeable against the property sold.—HUGHES v. EDISTO CYPRESS SHINGLE CO., S. Car., 28 S. E. Rep. 2.

34. CRIMINAL EVIDENCE—False Pretenses.—On the trial of an indictment for obtaining property by false pretenses, the allegation that they were made with intent to defraud may be proved by transactions, with other parties which tend to show a fraudulent scheme to obtain property by devices similar to those practiced upon the complainant, provided the dealings are sufficiently connected in point of time and character to authorize an inference that the transaction was in pursuance of the same general purpose; and the fact that such evidence would tend to prove that the defendant was guilty of other crimes will not prevent its reception.—PEOPLE v. PECKENS, N. Y., 47 N. E. Rep. 883.

35. CRIMINAL EVIDENCE — Larceny.—On the question of the guilt or innocence of one's possession of stolen property, evidence is admissible that other stolen property was found in his possession at the same time.—JOHNSON v. STATE, Ind., 47 N. E. Rep. 926.

36. CRIMINAL EVIDENCE—Murder—Confession.—Less credence is not to be given a confession because the one making it was at the time slightly intoxicated.—LEACH v. STATE, Tenn., 42 S. W. Rep. 195.

37. CRIMINAL EVIDENCE—Papers in Custody of Wife—Cheat.—The production of a paper belonging to a wife, and which is in the custody either of herself or her attorney, cannot be compelled, for the purpose of using the same as evidence for the State in the trial of a criminal case against her husband, by serving a subpœna *duces tecum*, or other process, either upon the wife or the attorney, or upon both. Under such circumstances, the paper in question is so far inaccessible as that secondary evidence of its contents is admissible.—FARMER v. STATE, Ga., 28 S. E. Rep. 26.

38. CRIMINAL LAW—Assault with Intent to Commit Rape.—A charge of "assault with intent to commit rape" does not include the offense of "assault," where the prosecutrix was under the age of consent, and her willingness was fully established.—PEOPLE v. GOMEZ, Cal., 50 Pac. Rep. 427.

39. CRIMINAL LAW—Assault with Intent to Kill.—In a prosecution for assault with intent to kill, an instruction that "malice includes not only anger, hatred, revenge, but any other unlawful and unjustifiable motive," is not ground for complaint, where it is immediately qualified by the further charge that "a thing done with a wicked mind, and attended with such circumstances as plainly indicate a heart regardless of social duty, and fully bent on mischief, indicates malice. Hence malice is implied from any deliberate and cool act against another, however sudden, which shows an abandoned and wicked heart. — STATE v. DOLAN, Wash., 50 Pac. Rep. 472.

40. CRIMINAL LAW — Homicide — Verdict.—Where a verdict for murder in the first degree is returned, the court has no power to adjudge defendant guilty of murder in the second degree, on the ground that such verdict is contrary to the law and evidence.—STATE v. SYMES, Wash., 50 Pac. Rep. 487.

41. CRIMINAL LAW—Homicide—Poison.—Under Code 1873, § 3849, providing that "all murder which is perpetrated by means of poison, is murder in the first degree," an indictment for murder committed by means of poison need not charge that defendant did unlawfully, feloniously, deliberately, and premeditately killed ceased.—STATE v. VAN TASSEL, Iowa, 72 N. W. Rep. 497.

42. CRIMINAL LAW—Larceny—Venue.—Where property is stolen in one county of this State, and is taken by the thief into another, he may be prosecuted and convicted in either county.—HURLBURT v. STATE, Neb., 72 N. W. Rep. 471.

43. CRIMINAL LAW—Suspension of Sentence.—On the day set for sentence the court, on motion of counsel for defendant (the district attorney consenting), ordered that sentence be suspended, and defendant allowed to ship on a certain vessel. The sheriff returned that he had delivered defendant on board the vessel indicated, where he was shipped as a sailor. Nearly four years thereafter, defendant was arrested on a bench warrant, the order of suspension of judgment set aside, and sentence of imprisonment imposed: Held, that defendant could not be heard to complian

of such sentence, on the ground that the court had lost jurisdiction, as the former order merely suspended sentence until the further order of the court, and was made on motion of defendant.—PEOPLE v. PATRICK, Cal., 50 Pac. Rep. 425.

44. DECEIT—Fraud. — An action to recover damages for deceit cannot be maintained without proof of fraud, as well as injury, but the fraud may consist in the affirmation of positive knowledge of that which one does not positively know; and where a party represents a material fact to be true to his personal knowledge, as distinguished from belief or opinion, when he does not know whether it is true or not, and it is actually untrue, he is guilty of falsehood, even if he believes it to be true; and if the statement is thus made with the intention that it shall be acted upon by another, who does so act upon it to his injury, the result is actionable fraud.—HADCOCK v. OSMER, N. Y., 47 N. E. Rep. 923.

45. DEED — Covenant Assuming Mortgage.—Where a deed containing a covenant by the grantee assuming and agreeing to pay a mortgage on the land is accepted by him, he obligates himself to pay the mortgage as fully as if he had signed the deed. — BEESON v. GREEN, Iowa, 72 N. W. Rep. 555.

46. DEEDS—Delivery—Presumption. — Proof that the consideration for a deed was not paid is not alone sufficient to rebut the presumption under Civ. Code, § 1055, providing that "a grant duly executed is presumed to have been delivered at its date." — GERKE v. CAMERON, Cal., 50 Pac. Rep. 434.

47. DOWER—Effect of Partition. — The interest of the widow of an intestate in the lands of her deceased husband, after the sale of the lands in partition, remains the same as before the sale,—that of a tenant for life.—KUNSELMAN v. STINE, Penn., 38 Atl. Rep. 414.

48. EQUITY—Pleading — Tender.—An allegation that "defendant now brings the money into court" is equivalent to an allegation that defendant, either in person or by solicitor, walked into the court with his answer, and brought the money with him, and, with the answer, delivered it to the clerk.—NELDON v. ROOF, N. J., 38 Atl. Rep. 429.

49. EVIDENCE — Declarations — Res Gestæ.—Declarations of a thief, made before the theft, that he had made arrangements to sell property of plaintiff to defendant, and declarations after the theft that he had sold the property to defend nt, are not a part of the *res gestæ*, and are not admissible against defendant, if made in his absence, unless a conspiracy between him and the thief is shown. — HACKETT v. FREEMAN, Iowa, 72 N. W. Rep. 528.

50. EVIDENCE—Expert — Foreign Laws.—In conformity with the general rule which admits in evidence the opinions of skilled witnesses on all subjects of science, the existence and meaning of the laws, as well written as unwritten, of another State, may be proved by caling professional persons to give their opinions on the subject. — TITLE GUARANTEE & TRUST CO. v. TRENTON POTTERIES CO., N. J., 38 Atl. Rep. 422.

51. EVIDENCE — Illegitimacy — Burden of Proof. — Wherever a question of legitimacy arises, the child whose origin is in question is presumed to be legitimate until shown to be otherwise, and the burden of proving illegitimacy rests upon the party alleging it.—IN RE MATTHEWS' ESTATE, N. Y., 47 N. E. Rep. 901.

52. EXECUTION—Claim of Exemptions — Validity.—A claim of exemptions made by a judgment debtor by delivering a verified schedule of his property to the officer, who admits service thereon by copy, and returns the original to the debtor, retaining the copy, is a substantial compliance with Comp. Laws, § 5130, requiring the debtor to deliver the schedule to the officer.—SWENSON v. CHRISTOFERSON, S. Dak., 72 N. W. Rep. 459.

53. EXECUTION—Property Subject.—Specific property belonging to a partnership is subject to levy for the individual debt of one of the partners. — JOHNSON v. WINGFIELD, Tenn., 42 S. W. Rep. 203.

54. EXECUTION SALE — Procedure. — It is the duty of an officer making a sale of real estate under execution or order of sale to deposit in the office of the clerk of the court from which the writ issued a copy of the appraisement of the property and other papers, as required by section 491*d* of the Code of Civil Procedure, and such duty must be performed prior to the advertisement of the sale.—REULAND v. WAUGH, Neb., 72 N. W. Rep. 481.

55. EXECUTION — Scholarship.—A perpetual scholarship, granted to a person by a college in recognition of his gifts to it, authorizing him to place and keep therein one pupil without charge, is not subject to execution. — CLEVELAND NAT. BANK v. MORROW, Tenn., 42 S. W. Rep. 200.

56. FEDERAL COURTS — Jurisdiction—Amount in Dispute.—Where the complaint on its face shows that the amount in dispute exceeds $2,000, and there are no facts alleged from which the court can determine, as a matter of law, that there cannot be a recovery of the jurisdictional amount, the question will not be determined on *ex parte* affidavits. — HOLDEN v. UTAH & M. MACHINERY CO., U. S. C. C., D. (Utah), 82 Fed. Rep. 209.

57. FRAUDULENT CONVEYANCE — Evidence. — Where money is obtained by a loan on the homestead standing in the name of the wife, a purchase of personalty in the name of the wife, paid for by a portion of the money so obtained, is not fraudulent as to the creditors of the husband. — FARMERS' TRUST CO. v. LIND, Iowa, 72 N. W. Rep. 496.

58. GIFT—Perpetuities.—Testator gave national bank stock to the bank's cashier, in trust to distribute the dividends to designated employees during the corporate existence of the bank, "either under its present charter, or by virtue of any renewals or extensions thereof." The bank was incorporated on June 19, 1865, for the period of 20 years, and its existence was extended 20 years under the federal law of 1882. Testator died in November, 1891, and no law then or has since existed authorizing any further extension. Held, that the gift violated the rule against perpetuities, and was void, in that the trust might not be completely performed in 21 years. — SIEDLER v. SYMS, N. J., 38 Atl. Rep. 424.

59. GIFTS—Wills—Execution.—Parol evidence of the facts and circumstances surrounding a person executing an instrument of gift may be received to show that such instrument was intended as a will, and not a donation *inter vivos*, and may also be received to ascertain the subjects and objects of the testator's bounty, and to show that another, whose signature appears upon the instrument in connection with that of the maker, did not sign as a joint testator. — SMITH v. HOLDEN, Kan., 50 Pac. Rep. 447.

60. HABEAS CORPUS — Sufficiency of Petition — Res Judicata.—In *habeas corpus* to release one convicted of crime in a State court, where the judgment has been affirmed by the State supreme court, and a writ of error to the Supreme Court of the United States has been dismissed for want of jurisdiction, it cannot be assumed that any point on which jurisdiction by the latter court might have been sustained was overlooked, merely because that point was not specifically raised therein or in the State supreme court. — CRAEMER v. STATE OF WASHINGTON, U. S. S. C., 18 S. C. Rep. 1.

61. HOMESTEAD — Abandonment.—The vendee under a land contract occupied the land, with his family, as a homestead. Owing to his inability to make the required payments, he surrendered the contract to the vendor, who sold and conveyed the land to a third person, and the original vendee leased the premises from this grantee: Held, that by acquiescing in this arrangement, with full knowledge of the facts, the wife of the original vendee abandoned her homestead rights in the land.—ANDERSON v. COSMAN, Iowa, 72 N. W. Rep. 523.

62. HUSBAND AND WIFE — Community Property. — A surviving husband may sell a homestead to pay community debts, and leave the other community property unsold.—BURKITT v. KEY, Tex., 42 S. W. Rep. 231.

63. HUSBAND AND WIFE—Debt Due Wife from Husband. —A bond secured by mortgage on a farm, and containing the usual promise to pay interest, was bequeathed by the mortgagee in trust for his daughter (the mortgagor's wife) during her life. The legatee never demanded the mortgage interest from her husband, nor did he promise her to pay the same; and the income from the farm was, with her assent, applied to the support of the family, said farm being all the property owned by the husband: Held, that the presumption was that the wife did not intend to claim her interest money, and hence a subsequent purchaser of the farm under judgments against the husband was only liable for interest on the mortgage from the time of his purchase.—STUART v. STUART, Penn., 38 Atl. Rep. 409.

64. INJUNCTION AGAINST ENFORCEMENT OF ORDINANCE. —Proceedings to enforce a penal ordinance enacted by authority of the legislature are criminal, within the rule that the validity of a criminal statute will not be tested, nor its enforcement enjoined, by a court of equity, unless the party seeking such relief will otherwise sustain irreparable injury for which he has no plain, speedy, and adequate remedy at law.—EWING v. CITY OF WEBSTER CITY, Iowa, 72 N. W. Rep. 511.

65. INSOLVENCY—Preferences.—A failing debtor may pay a pre-existing indebtedness by sale and conveyance of property to the creditor of a value not materially or appreciably greater than the amount of the debt, if the transaction is *bona fide* on the part of the creditor; and the validity of the sale will not be affected by the existence of a fraudulent intent of the vendor, of which the purchaser has knowledge, in regard to the claims of the other creditors, provided he does not participate in such intent. — SUNDAY CREEK COAL CO. v. BURNHAM, Neb., 72 N. W. Rep. 487.

66. INSURANCE—Reformation of Policy.—An insurance policy, like any other written contract, may be impeached by either party thereto for fraud or mistake; and parol testimony is competent to reform the policy so as to make it recite the actual agreement between the parties.—SLOBIDISKY v. PHENIX INS. CO. OF HARTFORD, Neb., 72 N. W. Rep. 483.

67. JUDGMENT — Collateral Impeachment.—An action may be maintained to set aside a judgment valid on its face on the ground that the summons was never served on the defendant. Such an action is not a collateral, but a direct, attack upon the judgment. — VAULE v. MILLER, Minn., 72 N. W. Rep. 452.

68. JUDICIAL SALE — Application of Payments.—The rule as to the application of payments voluntarily made does not apply to money derived from a judicial sale of property securing several debts, but such payment, being made by operation of law, is to be applied, in the absence of directions in the security, *pro rata* upon the debts secured, without regard to priority of date, or to the fact that other securities are held for some of the debts.—ARMSTRONG v. MCLEAN, N. Y., 47 N. E. Rep. 412.

69. JUDICIAL SALE—Sheriff's Sale—Vacating.—A trial court has a very wide and extended discretion in setting aside and modifying proceedings had in its own court, if it does so at the same term at which the proceedings are had. But, after final judgment has been rendered, and the term expires, there must be a substantial compliance with the statute to give the court further jurisdiction, which was not done in this case. —ALLIANCE TRUST CO. v. BARRETT, Kan., 50 Pac. Rep. 465.

70. LANDLORD AND TENANT—Possession — Estoppel.— Where, in an action for possession under the landlord and tenant act, plaintiff (a purchaser of the property at auction) testified that, at the sale, defendant, in answer to an interrogatory, stated that he would leave the premises, which the tenant denied, the only issue was such fact, and instructions as to estoppel by silence were properly refused.—WOODBURY v. BUTLER, N. H., 38 Atl. Rep. 379.

71. LIBEL—Charging Public Officer with Malfeasance. —A publication which falsely and maliciously imputes to a public officer misconduct in office is a libel: Held, that the publication sued upon in this action was libelous on its face.—MARTIN v. PAINE, Minn., 72 N. W. Rep. 450.

72. LIMITATIONS — Ejectment.—Rev. St. U. S. § 5057, providing a limitation of two years for actions brought by and against assignees in bankruptcy touching property transferable to or vested in such assignees, does not apply to actions founded upon causes arising after the estate comes to the hands of the assignee, and accordingly an action of ejectment, brought by an assignee in bankruptcy, founded upon a wrongful entry, made after the assignment of the bankrupt's estate to him, is not barred by the lapse of two years after such entry before the action is commenced.—BOWEN v. DELAWARE, L. & W. R. CO., N. Y., 47 N. E. Rep. 907.

73. LIMITATIONS—Running of the Statute.—Where an action was instituted by a nominal plaintiff, alleging itself to be a corporation, when in fact in was none, the action was not saved from the operation of the statute of limitations by an amendment afterwards made, introducing a natural person as a party suing for the use of the original plaintiff, and the defendant, in aid of the plea of the statute, as against the new plaintiff, could plead and prove that the original plaintiff was not a corporation; the statutory bar having attached while the action was pending, and before the amendment was made.—BEATY v. ATLANTA & W. P. R. CO., Ga., 28 S. E. Rep. 33.

74. MARRIED WOMEN—Mortgages—Record.—The lawmaker has, in article 129 of the Civil Code, provided a method by which married women are enabled to waive their rank of mortgage in favor of subsequent mortgages granted by their husbands. Parties cannot be permitted to accomplish the same result, and to withdraw from a wife the protection which the provisions of that article afford her, by having recourse for that purpose to the expedient of causing her to make in a notarial act an unfounded acknowledgment that she had received payment from her husband of paraphernal funds of hers, received by him and converted to his own use, and, coupled with said acknowledgment, an authorization to the recorder to erase, on the strength of the same, the evidence of her mortgage from the records. The wife is not estopped, by such acknowledgment, from contesting the truthfulness of the same, and from contesting the erasure of mortgage bonds thereon, and she is authorized to introduce parol evidence in support of her contest.—EQUITABLE SECURITIES CO. v. TALBERT, La., 22 South. Rep. 762.

75. MASTER AND SERVANT — Defective Appliances.— Where it is a servant's duty to keep appliances, properly constructed, in safe condition for use, he cannot recover for an injury to himself caused by their unsafe condition.—CONWAY v. CHICAGO, G. W. RY. CO., Iowa, 72 N. W. Rep. 543.

76. MASTER AND SERVANT — Injury — Assumption of Risk.—A brakeman assumes the risk, when descending from the top of a freight car, of being struck by a picket fence on the top of a wall 3 feet 9 1 2 inches from the nearest rail, though he has no actual knowledge of its existence.—RYAN v. NEW YORK, N. H. & H. R. CO., Mass., 47 N. E. Rep. 877.

77. MASTER AND SERVANT—Negligence of Fellow-servant.—The foreman of a gang of bridge repairers, who is furnished with a flag, and charged with the duty of signaling approaching trains to slow up if the condition of the bridge requires it, is engaged in the operation of the railroad, within the meaning of Code 1873, § 1307, which renders railroad companies liable for injuries to employees caused by the negligence of coemployees "engaged in the operation of any railway;" and the railway company is liable for the death of an employee who was killed by the derailment of a train

while crossing the bridge, owing to the foreman's neglect to signal the train to slow up.—KEATLEY v. ILLINOIS CENT. R. CO., Iowa, 72 N. W. Rep. 545.

78. MASTER AND SERVANT—Negligence of Foreman.—The negligent act of a foreman, not a part of his duty as representative of the employer, will not render the employer liable to a servant thereby injured.—FRAWLEY v. SHELDON, R. I., 38 Atl. Rep. 370.

79. MECHANIC'S LIEN—Contract with Owner.—A son who is farming his father's land, with his father using the proceeds as he sees fit, has no interest in the land; and no lien attaches to the land for lumber furnished for improvements thereon under a contract with the son in his own name, and for the purchase price of which he executed his individual notes.—HOAG v. HAY, Iowa, 72 N. W. Rep. 525.

80. MORTGAGE — Assignment—Notice.—The record of an assignment of a mortgage is constructive notice to all persons of the rights of the assignee, as against any subsequent acts of the mortgagee, save only as excepted by the statute.—ROBBINS v. LARSON, Minn., 72 N. W. Rep. 456.

81. MORTGAGES—Estoppel by Negligence.—The rights of a mortgagee, who merely handed the mortgage to the mortgagor at his request, and for the purpose of inspection only, are in no way affected by the latter's secretly and fraudulently substituting in its place a copy thereof, abstracting the original, and forging upon it an entry of satisfaction, by means of which he procured the record of the mortgage to be canceled; it not appearing that the mortgagee, other than as above stated, reposed any trust or confidence in the mortgagor, or delegated to him the performance of any duty with respect to the mortgage, or had any reason to suspect the fraudulent design, or was negligent in not detecting the fraud at the time of its pepetration or thereafter. In such case, even a *bona fide* purchaser of the mortgaged premises, though he bought in the honest belief that the mortgage had been actually satisfied, took, nevertheless, subject to its lien.—LUTHER v. CLAY, Ga., 28 S. E. Rep. 46.

82. MORTGAGE — Foreclosure.—Acceptance of deed containing covenant that as part of the purchase price and consideration the grantee shall assume and pay a mortgage then on the property, renders him personally liable for the mortgage debt.—CONNOR v. JONES, S. Dak., 72 N. W. Rep. 463.

83. MORTGAGES—Payment to Agent.—In an action to foreclose a mortgage, the defense being payment, evidence examined, and held insufficient to establish authority or ostensible authority in a third person, to whom the money was paid, to act for the holder of the note and mortgage in that behalf.—FREY v. CURTIS, Neb., 72 N. W. Rep. 478.

84. MORTGAGE — Purchase of Tax Title.—One who stands in the mere relation of mortgagee is under no obligation to pay taxes on the mortgaged premises, nor is he precluded from acquiring a tax title thereto based on tax sales made before he went into possession of the premises.—MCLAUGHLIN v. ACOM, Kan., 50 Pac. Rep. 441.

85. MINES AND MINERALS — Adverse Claims.—Under Rev. St. U. S. § 2324, providing that, on each mineral claim located, not less than $100 worth of labor shall be performed or improvements made during each year until a patent has been issued therefor, but, where such claims are held in common, such expenditure may be made on any one claim, and, on a failure to comply with such condition, the claim or mine on which such failure occurred shall be open to relocation in the same manner as if no location thereof had ever been made, the burden of proving forfeiture or an intention to abandon is on the one claiming an adverse location.—AXIOM MIN. CO. v. WHITE, S. Dak., 72 N. W. Rep. 462.

86. MUNICIPAL CORPORATIONS.—Where a city fails to provide an office for the mayor at some convenient place, as required by Code, § 518, he may furnish one himself, and collect from the city the actual, reasonable expense thereof.—HILL v. CITY OF CLARINDA, Iowa, 72 N. W. Rep. 542.

87. MUNICIPAL CORPORATIONS—Council Committees—Expenses.—Where members of a board of alderman are appointed a special committee, with authority to do what in their opinion would "best subserve the interest of the city" in relation to a bill pending in the legislature, they are entitled to be reimbursed by the city for personal expenses necessarily incurred in the discharge of their duty.—RIDER v. CITY OF PORTSMOUTH, N. H., 38 Atl. Rep. 385.

88. MUNICIPAL CORPORATIONS — Liability — Drawbridges.—A town constructed a drawbridge shaft without boxing it, and when the draw was operated the shaft revolved rapidly, and was dangerous. The draw was so constructed that the bridge tender, while operating it, could not see persons near the shaft: Held, not to show a defective highway, as the duty to operate a draw is distinct from that of keeping the bridge safe for travel.—DALY v. CITY AND TOWN OF NEW HAVEN, Conn., 38 Atl. Rep. 397.

89. MUNICIPAL CORPORATIONS — Removal of Employees.—The water commissioner of the city of Lincoln has not the power to remove a subordinate employee in the water department of the city, or to make appointments to fill vacancies occurring therein.—PERCIVAL v. WIER, Neb., 72 N. W. Rep. 477.

90. NEGLIGENCE — Dangerous Highways—Choice of Routes.—The crossing of an inclined bridge over a ditch from three to four feet deep, intersecting a street and constructed of three planks, each one foot wide and twenty feet long, laid lengthwise across the ditch, without side rails, is not negligence, though there was another route that was perfectly safe, and equally feasible.—HOUSTON & T. C. R. CO. v. DUNN, Tex., 42 S. W. Rep. 250.

91. NEGLIGENCE—Injuries—Sufficiency of Complaint.—A complaint, in an action against a foundry company for damages for a personal injury, was sufficiently specific where it alleged that defendant, having excavated a molding pit, negligently permitted it to remain open, and unsupplied with signals, and without guards around it, and that plaintiff, while working near it, in the performance of his duties, without knowledge of its existence, on account of the darkness, and without carelessness on his part, walked into it, and was injured.—EAST CHICAGO FOUNDRY CO. v. ANKENY, Ind., 47 N. E. Rep. 986.

92. NEGLIGENCE — Waterworks Companies—Dangerous Premises.—A waterworks company which maintains upon its grounds deep reservoirs of water, attractive to small boys, who, to its knowledge, and with its permission, resort thereto for fishing and for play, and which takes no reasonable precautions to prevent accidents to them while engaged in such amusements, is liable in damages if one of them, without negligence upon his part, falls in and is drowned.—PRICE v. ATCHISON WATER CO., Kan., 50 Pac. Rep. 450.

93. NUISANCE — Operation of Machinery.—A street railway corporation authorized to construct and operate motors and cables, but not invested with the power of eminent domain, is liable for special injury to the property of another caused by the jarring and vibration of machinery operated by said corporation on its own premises, though no actual negligence be proved.—ROGERS v. PHILADELPHIA TRACTION CO., Penn., 38 Atl. Rep. 399.

94. PARTNERSHIP — Accounting — Contract. — Where plaintiff put a certain sum into the business of a firm, and on becoming a copartner accepted a certain named valuation of the firm's real estate as so much firm assets, he cannot subsequently, on a final accounting, increase his proportionate share of the total assets by showing that said real estate was not worth said valuation, unless he was entitled to a rescission of his contract, made when he became a copartner, on the ground that he was induced by fraud to accept said valuation.—VECK v. CULBERTSON, Tex., 42 S. W. Rep. 253.